

NO. _____

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

APPENDIX - GENERAL FORM

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

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NO. 2-81-116-CR

IN THE COURT OF APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

RICHARD DWAYNE TAYLOR

APPELLANT

VS.

THE STATE OF TEXAS

STATE

FROM THE DISTRICT COURT OF WICHITA COUNTY

OPINION

This is an appeal from a conviction of burglary of a building.

Punishment, enhanced by a prior conviction, was assessed by the jury at life imprisonment in the Texas Department of Corrections.

We affirm.

On Saturday morning, December 10, 1977, Ronnie Hale arrived at his automobile upholstering business in Wichita Falls to complete a job. The business was not then open to the public. Hale unlocked the door, entered the building, and proceeded to an oil fueled heat stove to light it. As he kneeled at the stove, Hale noticed a movement beside him. Hale turned and saw the appellant, with whom he had been casually acquainted for sometime. At that point, appellant stabbed Hale in the neck with a blade from a pair of upholstery shears. Appellant, undaunted by Hale's pleas for mercy, continued his assault. After a prolonged struggle, in which he received multiple wounds, Hale escaped from the building and staggered to a used car lot across the street. The owner of the car lot asked Hale what had happened, to which Hale replied that appellant had stabbed him. The victim gave the same response to police officers arriving at the car lot minutes later. Investigation of the upholstery shop revealed

that it had been forcibly entered, and the money box of a coke machine in the building had been pried open.

We find no merit to appellant's contention that the evidence is insufficient to support his conviction. From the evidence, the jury could properly find that appellant entered the building, not then open to the public, with intent to commit theft, without the effective consent of the owner, Ronnie Hale.

The evidence supports the jury's additional finding at the punishment stage of the trial that, while appellant was in the building, he injured Ronnie Hale by stabbing him with a blade from a pair of upholstery shears. Appellant's fourth ground of error is overruled.

By appellant's ground of error number one, he claims that the statute, under which he was prosecuted, is unconstitutional. V.T.C.A., Penal, sec. 30.02, states in pertinent part: "(a) A person commits an offense if, without the effective consent of the owner, he: (1) enters a habitation or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; . . . (d) An offense under this section is a felony of the first degree if . . . (3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building."

Appellant contends that subsection (d)(3), which escalates the offense of second degree burglary into a first degree offense if the actor injures anyone during commission of the burglary, is unconstitutionally vague. Specifically, appellant argues that the term "injure" is not defined in the Penal Code, although the terms "bodily injury" and "serious bodily injury" are defined. Therefore, appellant argues, if the statute is intended to address only physical harm or incapacitation to a person, it would couch its language in terms of "bodily injury" or "serious bodily injury". Appellant stresses that "to injure anyone" encompasses

a broad range of transgressions beyond the scope of personal assault, such as causing property damage or a violation of a legal right. Appellant argues that no statute can survive such indefinite composition.

It is the duty of this court to construe statutes in such a way as to uphold their constitutionality. Ely v. State, 582 S.W.2d 416 (Tex. Crim. App. 1979). When construing a statute, the court must determine and follow the legislative intent underlying the enactment of the statute. Faulk v. State, 608 S.W.2d 625 (Tex. Crim. App. 1980).

Examination of the statute in question leads us to the conclusion that the legislation sought to deter physical assault by an actor against another in the course of a burglary. To construe the phrase "injure another" to include violation of a legal right or property damage would be superfluous. Damage to property and violation of a legal right exist upon the occurrence of the burglary. Thus, under this construction, the aggravating circumstances of the first degree felony would be no greater than the ordinary result of the second degree offense of burglary itself.

A reading of the remainder of subsection (d) indicates that the offense is of the first degree if (1) the building is a habitation; or (2) if the actor is armed with a deadly weapon or explosives. The clear import of this subsection is to deter physical injury to people. We decline appellant's invitation to hold the statute unconstitutionally vague. Ground of error one is overruled.

Appellant's second ground of error asserts that the indictment under which he was prosecuted is fundamentally defective. The indictment reads in pertinent part:

"That Richard Dwayne Taylor on or about the 10th day of December, A.D., 1977 and anterior to the present-
ment of this indictment, in the County of Wichita and

the State of Texas, did then and there, with intent to commit theft, enter a building which was not then open to the public, without the effective consent of Ronnie Hale, the owner, and while in the building the said Richard Dwayne Taylor did injure the said Ronnie Hale by stabbing him with a sharp instrument, to-wit: one blade of a pair of scissors..."

Appellant claims that the State was required to plead and prove a culpable mental state; not only in commission of the burglary, but also in commission of the injury to Ronnie Hale. This same contention has been rejected by the Court of Criminal Appeals in relation to other sections of the Penal Code. In Bilbrey v. State, 594 S.W.2d 754 (Tex. Crim. App. 1980), it was held that a culpable mental state is not required to be alleged or proven for the exhibition of a deadly weapon during the commission of a robbery in order to elevate the offense to aggravated robbery. Culpability is required in the allegation of the primary offense, but is not necessary with reference to the aggravating circumstance.

Another case, in which this contention was advanced and rejected, dealt with the statute proscribing the carrying of weapons on or about the person. Uribe v. State, 573 S.W.2d 819 (Tex. Crim. App. 1978). In that case the Court of Criminal Appeals addressed V.T.C.A., Penal, §46.02, which provides:

"(a) A person commits an offense if he intentionally, knowingly, or recklessly carries on or about his person a handgun, illegal knife, or club.

"(b) Except as provided in Subsection (c), an offense under this section is a Class A misdemeanor.

"(c) An offense under this section is a felony of the third degree if it occurs on any premises licensed or issued a permit by this state for the sale or service of alcoholic beverages."

Appellant, in Uribe v. State, supra, was indicted for illegally carrying a firearm on a premises licensed to sell alcoholic beverages. The indictment alleged a culpable mental state for carrying the weapon, i.e., that he "did then and there knowingly and intentionally carry on and about his person a handgun. . ."

However, no culpability was alleged with regard to the aggravating factor of subsection (c), to-wit: carrying the fire-arm on a premises licensed to sell alcoholic beverages. The court, in rejecting the defective indictment claim, stated: "The definition of this offense in sec. 46.02(a), supra, prescribes a culpable mental state. Section 46.02(c), supra, does not create a separate offense, however, as its only effect is to raise the penalty when the offense is committed in a designated place. Thus the offense created by Subsections (a) and (c), supra, does not require a culpable mental state beyond that contained in Subsection (a)." Id. at 821.

We find, on the basis of the above authority, that the culpability alleged in the indictment is sufficient for the offense of burglary. No additional culpability need be alleged for the same offense to be elevated from a second to a first degree felony, due to the occurrence of an aggravating factor contained in the statute. Appellant's second ground of error is overruled.

In a related ground of error, appellant maintains that the trial court erred fundamentally in its charge to the jury at the guilt or innocence stage of the trial. The pertinent part of the charge states:

"Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Richard Dwayne Taylor, did, in Wichita County, Texas, on or about December 10, 1977, without the effective consent of Ronnie Hale, the owner, enter a building, which was not then open to the public, with intent to commit theft, you will find the defendant guilty of burglary.

"If you do not so believe, or if you have a reasonable doubt thereof, you will find the defendant not guilty."

Appellant contends that since the charge omits the injury allegation contained in the indictment, there is a fatal variance between the two. We reject this proposition.

As discussed with reference to ground of error two, the offense for which appellant was indicted, tried, and convicted is burglary. The charge, by the court, at the guilt or innocence stage of the trial correctly reflects this. The aggravating circumstance, in this case injury to Ronnie Hale, pertains to penalty not guilt.

Appellant recognized this by his motion in limine, which was granted by the trial court, wherein he requested that the aggravating circumstances, i.e., the injury to Ronnie Hale, not be submitted to the jury at the guilt or innocence phase of the trial. The trial court correctly charged the jury at the punishment phase of the trial on the range of punishment for burglary of a building (a second degree felony) as well as for burglary of a building with the aggravating factor of injury to a person (a first degree felony). Iness v. State, 606 S.W.2d 306 (Tex. Crim. App. 1980). Ground of error three is overruled.

The judgment of the trial court is affirmed.

RICHARD LEE BROWN,
JUSTICE

PANEL B

HUGHES, BROWN AND HOLMAN, JJ.

PUBLISH

APR 28 1982

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas JUL 21 1982

I have been instructed to advise that the Court has this day refused
the Appellant's petition for discretionary review in
Cause No. 0434-82 ,
Richard Dwayne Taylor

Sincerely yours,

THOMAS LOWE, Clerk

RECEIVED IN
COURT OF CRIMINAL APPEALS
THOMAS LOWE, CLERK

AUG 30 1982

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RICHARD DWAYNE TAYLOR
Appellant

S

FILED
Court of Appeals
9-2

VS.

S

NO. 0434-82

THE STATE OF TEXAS,
Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that Richard Dwayne Taylor, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Criminal Appeals of Texas, entered herein on the 21st day of July, 1982.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Respectfully submitted,

SMITH, DOUGLASS & COOK
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

By:


S. Price Smith, Jr.
State Bar No. 18753500

Attorney for Appellant

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OCT 29 1982

Office of the Clerk
SUPREME COURT, U.S.

NO. 72-5630

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT
v.
THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

AFFIDAVIT

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

NO. _____

THE STATE OF TEXAS
COUNTY OF WICHITA

S AFFIDAVIT
S

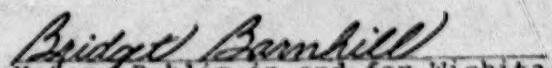
BEFORE ME, the undersigned authority, on this day personally appeared S. Price Smith, Jr., who after first being duly sworn, stated under oath as follows:

"My name is S. Price Smith, Jr. I have personal knowledge that within the time specified for filing, and specifically the 15th day of October, 1982, the following instruments were deposited in the United States mail, with first-class postage prepaid, certified, return receipt requested, properly addressed to the Office of the Clerk, The Supreme Court of the United States, Washington, D. C. 20543:

1. Notice of Formal Appearance or Entry of Appearance by Counsel for Appellant;
2. Motion for Leave to Proceed in Forma Pauperis;
3. Jurisdictional Statement - State Criminal Case;
4. Designation by Appellant of Parts of Record to be Included in Appendix.


S. Price Smith, Jr.

SUBSCRIBED AND SWORN TO BEFORE ME this 25th day of October, 1982.

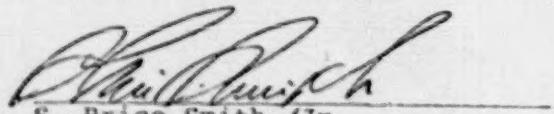

Bridget Barnhill
Notary Public in and for Wichita County, Texas



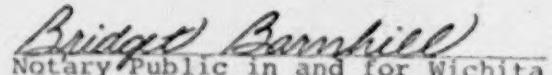
BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 1985
S.S. 457-92-3489

CERTIFICATE OF SERVICE

ON THIS the 25th day of October, 1982, a true and correct copy of the foregoing affidavit was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this cause and who represents the State of Texas, by depositing a copy of the affidavit in the United States Mail, certified, return receipt requested.


S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 25th day of October, 1982.


Bridget Barnhill
Notary Public in and for Wichita
County, Texas



BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 8, 1985
S.S. 457-82-1429

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 82-5630

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

DESIGNATION BY APPELLANT OF PARTS OF RECORD
TO BE INCLUDED IN APPENDIX

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

NO. _____

DESIGNATION BY APPELLANT OF PARTS OF RECORD
TO BE INCLUDED IN APPENDIX

TO: Timothy Eyssen, Counsel for Respondent

Appellant, Richard Dwayne Taylor, hereby designates the following portions of the record to be included in the appendix:

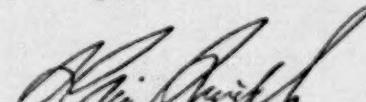
1. Indictment in the case styled The State of Texas v. Richard Dwayne Taylor, in Cause Number 18,059-C, in the 89th Judicial District Court of Wichita County, Texas.
2. Motion to Declare Article 30.02(d) (3), Vernon's Texas Penal Code Annotated, Unconstitutional, in the case styled The State of Texas v. Richard Dwayne Taylor, in Cause Number 18,059-C, in the 89th Judicial District Court of Wichita County, Texas.
3. Opinion of the Court of Appeals, No. 66,850, dated April 28, 1982.
4. Order Overruling Appellant's Petition for Discretionary Review dated July 21, 1982.
5. Notice of Appeal to the Supreme Court of the United States filed August 30, 1982.


S. Price Smith, Jr.
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

Attorney for Appellant

CERTIFICATE OF SERVICE

On this 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas, 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States Mail, certified, return receipt requested.



S. Price Smith, Jr.
Attorney for Appellant

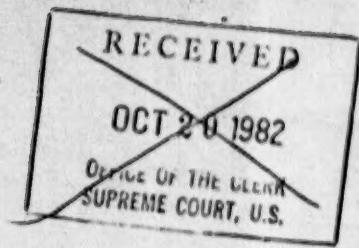
SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.



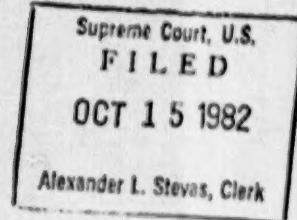
Bridget Barnhill
Notary Public in and for Wichita
County, Texas



BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Dec. 31, 1985
22-43-02-1408



NO. 82-5630



IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT - STATE CRIMINAL CASE

NOTICE OF FORMAL APPEARANCE
OR ENTRY OF APPEARANCE BY COUNSEL FOR APPELLANT

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

RICHARD DWAYNE TAYLOR, APPELLANT

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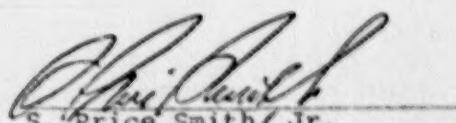
NO. _____

NOTICE OF FORMAL APPEARANCE
OR ENTRY OF APPEARANCE BY COUNSEL FOR APPELLANT

TO THE HONORABLE JUSTICES OF SAID COURT:

NOW COMES S. Price Smith, Jr., attorney for the Appellant herein, who has represented this Appellant on his appeal to the Texas Court of Criminal Appeals at Austin, Texas, and hereby gives notice of formal appearance in this Appellant's Jurisdictional Statement in that he has prepared the papers filed herein. His mailing address is:

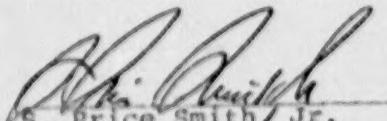
S. Price Smith, Jr.
Attorney at Law
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700


S. Price Smith, Jr.
State Bar No. 18753500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

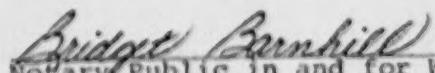
Attorney for Appellant

CERTIFICATE OF SERVICE

On this 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, Seventh and Lamar Street, Wichita Falls, Texas, 76301, who is the only opposition party in this Jurisdictional Statement and who represents the State of Texas, by depositing a copy of the above document in the United States Mail, certified, return receipt requested.


S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.


Bridget Barnhill
Notary Public in and for Wichita
County, Texas



BRIDGET BARNHILL
Notary Public, State of Texas
Commission Expires Mar. 6, 1985
13-437-02-5400

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NO. 82-5630

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OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

ON APPEAL FROM THE TEXAS COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

S. PRICE SMITH, JR.
Attorney for Appellant
State Bar No. 1873500
210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

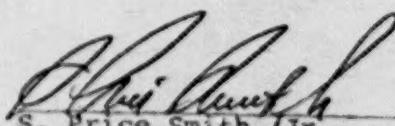
THE STATE OF TEXAS, RESPONDENT

NO. _____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Appellant, Richard Dwayne Taylor, moves the Court for an order permitting him to proceed in this Court, in forma pauperis, with his appeal from the judgment of the Texas Court of Criminal Appeals entered in this cause on July 21, 1982, pursuant to the provisions of Title 28, United States Code, Section 1915, and Rule 46 of the Rules of this Court, and in support thereof attaches the affidavit of said appellant.

Appellant's jurisdictional statement is being filed with this motion and appellant's affidavit.


S. Price Smith, Jr.
State Bar No. 18753500
Suite 210 Executive Building
Wichita Falls, Texas 76301
(817) 766-1700

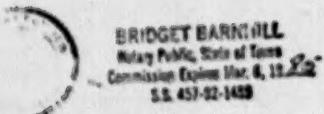
CERTIFICATE OF SERVICE

On this the 15th day of October, 1982, a true and correct copy of the foregoing document was mailed to Mr. Timothy Eyssen, District Attorney for Wichita County, Texas, whose address is the Wichita County Courthouse, 7th and Lamar Street, Wichita Falls, Texas 76301, who is the only opposition party in this cause and who represents the State of Texas, by depositing a copy of the above document in the United States mail, certified, return receipt requested, at Wichita Falls, Texas 76301.

S. Price Smith, Jr.
S. Price Smith, Jr.
Attorney for Appellant

SUBSCRIBED AND SWORN TO before me this 15th day of October, 1982.

Brigette Barnhill
Notary Public, Wichita County, Texas



IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER TERM, 1983

RICHARD DWAYNE TAYLOR, APPELLANT

v.

THE STATE OF TEXAS, RESPONDENT

APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS
AND AFFIDAVIT IN SUPPORT THEREOF

I, Richard Dwayne Taylor, hereby apply for leave to proceed in the above-entitled action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the Appellant in the above-entitled case and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

(3) The nature of my appeal is briefly stated as follows: constitutionality of Art. 30.02(d)(3), Tex. Penal Code Ann.

I further declare that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? No.

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. N/A

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.
N/A

3. Do you own any cash or checking or savings account? No.

a. If the answer is yes, state the total value of the items owned. N/A

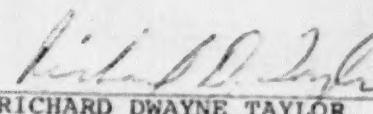
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons.

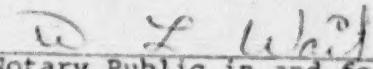
None; I have been incarcerated for the last four years.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.


RICHARD DWAYNE TAYLOR

SUBSCRIBED AND SWORN TO before me this 12 day of October, 1982.

My commission expires:
5/21/86.


Notary Public in and for Walker County, Texas